ARAB (M) CREDIT BHD.

v.

CHUA JUI KENG & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. CS C5067/85]
20 JUNE 1988

CIVIL PROCEDURE: *Judgment in default - 1st and 2nd defendants aware of Judgment in default - Lapse of 1 year 8 months before application to set aside - Whether incumbent on the defendants to explain delay in applying to set aside - Whether annexing proposed statement of defence to affidavit sufficient to show merits - Interest claimed after judgment in excess of that allowed under O. 42 r. 12 Rules of the High Court 1980 - Whether rendering judgment irregular.*

The 1st and 2nd defendants applied to set aside judgment in default of appearances which were entered against them on 15 June 1986 and 14 October 1985 after a lapse of 1 year and 8 months since the date of the last default judgment. The 1st and 2nd defendants alleged that they were only aware of the judgment in default when they were served with bankruptcy notices in April 1987 and December 1986.

The 1st and 2nd defendants also alleged that the judgments were irregular as the interest claimed after judgment was in excess of that allowed under O. 42 r. 12 RHC 1980.

Held:

[1] In view of the delay on the part of the 1st and 2nd defendants in filing the application to set aside the judgment in default, it was incumbent on the defendants to explain why they had not acted promptly to have the judgment set aside after they had been aware of the judgment in default.

[2] The mere production of a proposed statement of defence without more cannot raise any arguable or triable issue which entitles the 1st and 2nd defendants to plead that they gave a defence on the merits. They must in their affidavits in support also avert to facts to show that they have a defence on the merits.

[3] That even though the interest claimed after judgment is in excess of that allowed under O. 42 r. 12 RHC 1980, that did not amount to an irregularity which had the effect of nullifying the judgment but merely an irregularity which can be remedied by amending both judgments under O. 2 r. 1(2) RHC 1980 to reflect the permissible interest rate.

[Application dismissed with costs and interest chargeable after date of judgment in both judgments be at 8% per annum.]

Legislation referred to:
Rules of the High Court 1980, O. 2 r. 1(1), (2), O. 42 r. 12

For 1st and 2nd defendants/applicants - Philip Nainan; M/s. Philip Nainan & Co.
For plaintiffs/respondent - A. Sreenevasan; M/s. Skrine & Co.

JUDGMENT

Siti Norma Yaakob J:

Both the 1st and 2nd defendants in this suit applied to set aside the judgments in default of appearance entered against them on 15 June 1986 and 14 October 1985 respectively. Their application was filed on 26 February 1988, 1 year and 8 months since the date of the last default judgment and since they claim that they were not aware of the judgments until they were served with bankruptcy notices in April 1987 and December 1986 respectively, it becomes necessary for me to trace the steps taken by the parties in this suit to ascertain the truth or otherwise of the 1st and 2nd defendants' contention.

From an affidavit of service affirmed on 5 October 1985, it is clear that the 2nd defendant was served personally with the writ and statement of claim on 21 September 1985. He acknowledged receipt by signing at the back of the summons and he must be presumed to have known that he had, until 3 October 1985, to make his appearance. He did not do so and on 14 October 1985, the plaintiff filed a certificate of non-appearance and the judgment in default issued the same day.

Nine months later, on 15 July 1986, the plaintiff's solicitors posted a copy of the judgment to the 2nd defendant at both his home and office addresses and they also informed him that execution proceedings would follow if he fails to satisfy the judgment within 14 days of 15 July 1986. He did not do so, and a bankruptcy notice dated 6 August 1986 was issued against him. Despite several attempts at personal service, the bankruptcy notice was eventually served on him by way of substituted service on 30 December 1986, a fact admitted by him. Again he took no steps to oppose the Bankruptcy Notice until he was personally served with the Creditor's Petition on 1 July 1987, and on 20 January 1988, when the petition was before the Court, he filed an affidavit to oppose the petition followed by the filing of the present application to have the judgment in default set aside, on 26 February 1988.

Coming now to the 1st defendant, service of the writ and statement of claim was ordered to be effected on him by way of posting and advertisement once in any local newspaper. The posting was done on 20 March 1986 and the advertisement appeared in "The Star" on 21 April 1986 and under the order for substituted service, the 1st defendant was given 8 days upon the expiry of the last day of posting or advertisement within which to appear.

He failed to do so, but his solicitors, Messrs. S.S. Gill & Co. contacted the plaintiff's solicitors and the fact of this is evidenced by a letter dated 6 May 1986, wherein the plaintiff's solicitors gave the 1st defendant until 13 May 1986 within which to appear. Again he failed to do so and on 5 June 1986, the certificate of non-appearance was issued and the judgment in default entered against him the same day.

On 15 July 1986, the plaintiff's solicitors sent a copy of the judgment to the 1st defendant, together with their letter demanding settlement of the judgment sum within 14 days from the date of the letter, failing which execution proceedings would follow.

Nothing was heard from the 1st defendant after that, until he appeared at the plaintiff's officer on 16 April 1987 to try to negotiate a settlement. When negotiations fell through, he was personally served with the bankruptcy notice followed subsequently by service of the creditor's petition on him on 14 August 1987. Up to that stage, no attempt was ever made or indications given that he was going to have the judgment set aside until the present application was filed.

From the documentary evidence, it is very clear that both the 1st and 2nd defendants were aware of the judgments entered against them when they were served with them through the plaintiff's solicitor's letter dated 15 July 1986. Interestingly neither made any reference nor have they denied receipt of them when confronted by the plaintiff's affidavit that a copy of the judgment had been sent to them separately together with the covering letter dated 15 July 1986, which in the normal course of posting would have renched them by 20 July, 1986, the latest. Thus their contention that they had only been aware of the judgments when the bankruptcy notices were served on them in April 1987 and December 1986 is a blatant lie.

Thus from 20 July 1986 when the 1st and 2nd defendants were made aware of the judgments until 26 February 1988, when they filed the present application, there had been a period of 1 year and 7 months within which they did nothing and were content to let matters pass. Since they only decided to exercise their rights to question the judgments at the presentation of the creditor's petitions, I consider that it is incumbent upon them to explain why they had not acted promptly to have the judgments set aside. Since they had failed to offer any exceptable explanation, they have placed themselves in a position where their *bona fides* become highly suspect and doubtful. To that end, I cannot place much reliance on the defences that they have raised in their proposed statement of defence. This is even so when they had also failed to disclose facts in their affidavits to show a defence on the merits. The mere production of a proposed statement of defence without more cannot raise any arguable or triable issue that entitles the 1st and 2nd defendants to plead that they have a defence on the merits. They must, in their affidavits in support, also avert to facts to show that they have a defence on the merits. Since they had not done so, the proposed statement of defence is nothing more than a sham defence aimed at delaying proceedings.

However, they had submitted that both judgments are irregular as the interest claimed after judgment at 22% per annum is in excess of that allowed under O. 42 r. 12. This I consider is not an irregularity which has the effect of nullifying the judgments. (See O. 2 r. 1(1)). This irregularity can be easily remedied by my amending both judgments under O. 2 r. 1(2) to reflect the permissible rate of interest under O. 42 r. 12. To that end, I had accordingly dismissed the application of the 1st and 2nd defendants with costs but had ordered that the interest chargeable after the date of judgment until realisation in both the default judgments be at 8% per annum.

Also found at [1988] 2 CLJ 442